

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-184408

DATE: January 2, 1976

MATTER OF: Monogram Industries, Inc.

DIGEST:

1. Agency rejected all bids received as nonresponsive and resolicited requirement through negotiation. After participating in procurement through submission of best and final offers and award to another offeror, protester alleged before GAO that the rejection of its bid as non-responsive was improper; that the resolicitation should have been formally advertised; and that the protester had been subjected to a price auction. The protest is dismissed as to these contentions since the protester failed to raise them within the times prescribed by GAO's Bid Protest Procedures.
2. Allegation that low offer to supply sanitation systems represents a buy-in does not provide basis for objection to award, since award is not precluded in such instances.

Monogram Industries, Inc. (Monogram), an unsuccessful offeror on a Department of Interior solicitation, has protested the award made to Chrysler Corporation (Chrysler) on grounds that the award should have been made to Monogram under the initial formally advertised invitation which was canceled and that the ensuing negotiations after cancellation created a price auction in which the lower price submitted by Chrysler was a "buy-in."

Invitation for bids (IFB) No. 100-1777, issued April 8, 1975, by the Department of the Interior, Bureau of Reclamation (Bureau), solicited bids for the supply of oil recirculation sanitation systems, f.o.b. destination. Two bids were received and opened April 29, 1975. Monogram submitted the low bid of \$44,306 (f.o.b. shipping point) while Chrysler bid \$48,884 (f.o.b. destination). Both bids were found to be nonresponsive.

Monogram's bid on an f.o.b. origin basis was inconsistent with the terms of the solicitation and in the absence of information regarding the shipping weight of Monogram's product, the

agency states it could not compute the total cost to the Government of Monogram's bid. Chrysler qualified its bid price by making it contingent upon the rent-free use of Government facilities.

Following rejection of the bids, the contracting officer decided to negotiate the procurement in accordance with Federal Procurement Regulations (FPR) § 1-3.210(a)(3)(1964 ed.), which authorizes such action as follows: "When bids have been solicited * * * and no responsive bid has been received from a responsible bidder." Request for proposals (RFP) No. 100-1777 was issued May 15, 1975, resulting in initial proposal submissions on May 29, 1975, from Monogram and Chrysler. Monogram quoted a price of \$46,591 (f.o.b. destination) and Chrysler quoted a price of \$41,257 based on certain conditions including rent-free use of Government equipment. In view of the uncertainty as to Chrysler's pricing, the contracting officer determined further explanation and discussions were necessary. Oral discussions, confirmed in writing, were conducted with both parties on June 6. Best and final offers were requested by June 16, at which time Monogram reaffirmed its initial price of \$46,591, and Chrysler quoted a price of \$43,946 and eliminated the objectionable conditions originally stated in its proposal. On June 25, 1975, award was made to Chrysler for \$43,946. Monogram's protest to this Office was filed 12 days thereafter.

Initially Monogram protests the determination to reject its bid as nonresponsive. The IFB required that bids be submitted f.o.b. destination. However, Monogram crossed out the words "Delivered f.o.b. to destinations shown in the Schedule" on page 1 of its bid and inserted the following instead:

"NOTE: IN ACCORDANCE WITH MONOGRAM'S POLICY, OUR F.O.B. POINT IS IRVINE, CA. FREIGHT PRE-PAID AND ADDED AS SEPARATE ITEM TO INVOICE. (SHOULD SHIPPING DAMAGE OCCUR, MONOGRAM WILL ASSUME RESPONSIBILITY FOR FREIGHT CLAIMS, AND ETC."

However, since Monogram did not furnish any information as to the shipping weights of its products, the contracting officer concluded that Monogram's freight costs could not be evaluated and that therefore the bid was nonresponsive.

In its protest, Monogram asserts that it included the delivery exception only after receiving telephonic advice from an unidentified employee of the contracting agency that it could bid

f.o.b. its plant. Under the circumstances, the protester contends that the deviation was at most minor and it should have been allowed to correct its bid.

A threshold issue presented here concerns the timeliness of the protest. On May 9, 1975, the Bureau advised both bidders by letter that their bids had been rejected. It appears from the record that the first time Monogram complained about the rejection of its bid was in a letter of June 11, 1975, to the Bureau. In that letter Monogram not only communicated its best and final offer under the negotiated resolicitation, but it also used the occasion to express its dissatisfaction with "the circumstances that have prevailed," including the alleged oral advice concerning the submission of its bid. The letter did not state, however, that Monogram was "protesting" the rejection of the bid, even though the letter indicated that Monogram had knowledge of the existence of some basis for a protest. Instead, Monogram submitted its best and final offer under the negotiated procurement and waited until after the award to Chrysler to file this protest with our Office on July 3, 1975. This clearly is untimely under section 20.2(b)(2) of our Bid Protest Procedures, see 40 Fed. Reg. 17979 (1975), which states that:

"* * * bid protests shall be filed not later than 10 days after the basis for protest is known or should have been known, whichever is earlier."

Monogram's protest against the issuance of the RFP is based on its claim that formal advertising should have been used because standard off-the-shelf items were involved and that the resolicitation would lead to a price auction since bid prices had been publicly exposed. This aspect of the protest is also untimely. Section 20.2(b)(1) of our Bid Protest Procedures states that:

"Protests based upon alleged improprieties in any type of solicitation which are apparent prior to * * * the closing date for receipt of initial proposals shall be filed prior to * * * the closing date for receipt of initial proposals."

This provision is applicable to protests against the issuance of a solicitation as well as to protests against a particular defect in a solicitation. See Ira Gelber Food Services, Inc., et al., 54 Comp. Gen. 809 (1975), 75-1 CPD 186. As we observed

above, Monogram participated in the negotiations and did not protest to our Office until well after the closing date for receipt of proposals, thereby rendering the protest untimely with respect to this allegation.

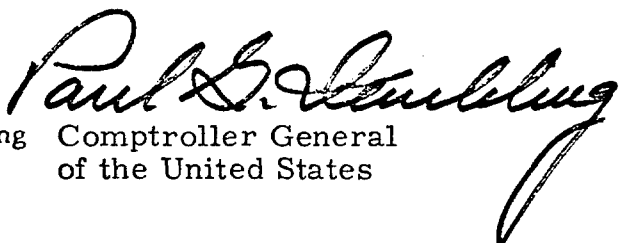
Monogram also claims that an auction was conducted because during negotiations it was told by the contracting officer that it was "now the higher bidder of the two responding parties." The contracting officer denies making that statement. In any event, this portion of the protest, based upon an alleged impropriety in the negotiation process which was known to Monogram not later than the June 16, 1975, closing date for receipt of proposals, is also untimely since it was not protested within 10 days. See Technology, Inc., 54 Comp. Gen. 681 (1975), 75-1 CPD 107.

Monogram's final contention is that the low offer by Chrysler was a "buy-in" is without merit.

"Buying-in" is the practice of attempting to obtain a contract by knowingly offering a price less than anticipated costs, with the expectation of either (1) increasing the contract price during the period of performance through change orders or other means, or (2) receiving future "follow-on" contracts at prices high enough to recover any losses on the original "buy-in" contract.

On this record we cannot conclude that the Chrysler price represents a "buy-in." Even if it was shown that Chrysler did intend to "buy-in" we would not be able to object to the legality of the contract award. Since the FPR does not provide for rejection of the bid where "buying-in" is shown, there is no legal basis to preclude or disturb an award merely because the low bidder submitted an unprofitable price. 50 Comp. Gen. 50, 54 (1970).

For the foregoing reasons, the protest is denied.


Acting Comptroller General
of the United States